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No. 80-1012

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, a California corporation; SCHWAB DISTRIBUTING COMPANY, INC., a California corporation dba GOLD COAST WINES & SPIRITS; LEWIS-WESTCO & CO., a California corporation; GREENE CAT LIQUORS, INC., a California corporation; FREDERICA AULDRIDGE dba SOUTH BAY LIQUOR; RALPH E. PIERCE and SHARON L. PIERCE dba TEXAS LIQUOR HOUSE; and WILLIAM A. KIRBY, JR., and SHIRLEY D. KIRBY dba HOUSE OF FINE SPIRITS,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD APPELLANT DISTRICT OF THE STATE OF CALIFORNIA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Under the Twenty-first Amendment grant to the states of virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system, does a state have the power to enact legislation prohibiting a licensed liquor importer from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner?

2. Does the California statute which prohibits a licensed liquor importer from purchasing or accepting delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner create a per se violation of the Sherman Act?

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[1] In addition to the parties listed in the caption, there were also two intervenors in the Court below: Bohemian Distributing Company, a California corporation, petitioner in consolidated case No. 80-1030, and Wine and Spirits Wholesalers of California, a California corporation, petitioner in consolidated case No. 80-1052.

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CITATION TO OPINION AND JUDGMENTS OF COURTS BELOW

Norman Williams Co., et al. v. *Rice* 108 Cal.App.3d 348 (1980); petition for hearing denied by Supreme Court of the State of California, September 24, 1980.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeal, Third Appellate District, State of California, was entered in an original proceeding before that Court on July 17, 1980. Petition for hearing was denied by the Supreme Court of the State of California on September 24, 1980. Petition for certiorari herein was filed on December 22, 1980, within 90 days after the case became final in the courts of California. This Court's jurisdiction is invoked under 28 United States Code section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in the instant case include:

United States Constitution, article 1, section 8, clause 3 (Commerce Clause):

> "The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several States . . . ."

United States Constitution, amendment XXI, section 2:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation

of the laws thereof, is hereby prohibited."

15 United States Code section 1 (Sherman Act):

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade among the several States, or with foreign nations, is declared to be illegal . . . ."

Statutes of California 1979, chapter 280, section 1 (A.B. 499, Liquor Importer Designation Statute):

"23672 (Business and Professions Code). A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent . . . ."

Statutes of California 1979, chapter 407, section 1 (Liquor Price Affirmation Statute):

"23673 (Business and Professions Code). No brand owner of distilled spirits or his agent shall sell any brand of distilled spirits to a wholesaler or rectifier in this state at a price higher than the lowest price at which such brand of distilled spirits is sold by such brand owner or his agent to any wholesaler or rectifier during any calendar month anywhere in any other state or in the District of Columbia or to any state or state agency which owns or operates retail distilled spirits stores.

"In determining the lowest price for which any brand of distilled spirits is sold in any other state or the District of Columbia or to any state or state agency which owns and operates retail distilled spirits stores, appropriate reduction shall be made to reflect all discounts, all rebates, allowances, and other inducements of any kind whatsoever offered or given to any such wholesaler or state, or state agency,

as the case may be, purchasing such brand of distilled spirits in such other state or in the District of Columbia or to the state or state agency which owns or operates retail distilled spirits stores; provided that nothing in this section shall prevent differentials in price which make only due allowance for differences in state excise taxes and fees and the actual cost of delivery. As used in this section, the term 'excise taxes and license fees' shall mean the excise taxes imposed or the fees required by any state or the District of Columbia."

Other relevant statutes and regulations are set forth in the Joint Appendix.

STATEMENT OF THE CASE

In November 1979, respondents herein (petitioners below) filed an original mandate petition in the California Court of Appeal, Third Appellate District, seeking to prevent the enforcement of a recently enacted amendment to the California Alcoholic Beverage Control Act, Business and Professions Code section 23672, scheduled to go into effect on January 1, 1980. (J.A. 2.) Intervention was permitted by Bohemian Distributing Company, a California corporation (petitioner in consolidated case No. 80-1030), and Wine and Spirits Wholesalers of California (petitioner in consolidated case No. 80-1052). (J.A. 3.) On December 31, 1979, the Court of Appeal issued an alternative writ of mandate directing instant petitioner Rice, Director of the Department of Alcoholic Beverage Control, to refrain from enforcement of Business and Professions Code section 23672 pending further order of the Court. (J.A. 4.)

On July 17, 1980, the Court of Appeal issued its opinion and peremptory writ of mandate ordering Rice to permanently refrain from enforcing the statute in question. (J.A. 9.) Petition for hearing in the California Supreme Court was denied on September 24, 1980. (J.A. 10.) On September 25, 1980, the Court of Appeal reissued its peremptory writ of mandate permanently preventing enforcement of the statute. (J.A. 10.)

Petition for certiorari was filed in this Court on December 22, 1980. Certiorari was granted by this Court on November 30, 1981.

In 1973, the California Legislature enacted Business and Professions Code section 23672 which prohibited a state licensed liquor importer from purchasing or accepting delivery of any brand of distilled spirits unless he was designated as an authorized importer by a licensee who filed the minimum retail price schedule for that brand in accordance with the existing state fair trade liquor statutes.[2] That latter licensee was necessarily the brand owner, or the brand owner's California agent.

This statute was strictly enforced by the California Department of Alcoholic Beverage Control until 1978,

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[2] California Statutes 1973, chapter 707, section 1:

"23672. A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as the authorized importer of such brand by the licensee who filed the minimum retail price schedule for such brand pursuant to Section 24755. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee."

when the California Supreme Court ruled that the state distilled spirits fair trade statute was in violation of the Sherman Act.[3] At that time, because minimum retail price schedules were no longer permitted, the Department took the position that, as there was no longer any licensee available who could file a minimum retail price schedule, it would no longer enforce the statute.

Among the respondents are licensed importers and wholesalers of distilled spirits as well as licensed retailers of distilled spirits. The importer respondents, no longer being under enforceable statutory restraint, secured sources of supply of national brand distilled spirits in Oklahoma and imported them into California.

This was permissible under Oklahoma law which provided that a distiller choosing to sell distilled spirits in that state had to sell to all licensed Oklahoma wholesalers and could not discriminate either as to price or as to quantity.[4] The distiller was required to sell distilled spirits at a rate which was no higher than the lowest rate which the seller sold in any other state.[5] The licensed wholesalers could sell to any licensed retailer or wholesaler within Oklahoma, and could sell distilled spirits out of Oklahoma to "qualified persons." [6]

In 1979, the California Legislature, purposely seeking to correct this new method of importation growing sporelike on the surface of the existing three-tiered stat-

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[3] *Rice* v. *Alcoholic Beverage Appeals Board,* 21 Cal.3d 431 (1978).
[4] Oklahoma Statutes 1961, volume 12, title 37, section 501 et seq.
[5] *Id.,* section 536.1, subdivision (a).
[6] *Id.,* section 521, subdivision (e).

utory structure of the state's liquor distribution system, amended the importer designation statute to read:

> "§ 23672. A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of a licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee." [7]

The purpose of this amendment was to put the law back to where it was before the State Supreme Court declared the retail price maintenance law invalid;[8] i.e., the brand owner or his authorized agent was the only person who could file the minimum retail price schedule and hence designate the importer under the old law; the brand owner or his authorized agent is the only person who can designate the importer under the new law.

This amendment was to become effective on January 1, 1980. Respondents, however, successfully brought an original proceeding in the California Court of Appeal, Third Appellate District, for a writ of mandate permanently ordering the instant petitioner, Director of the California Department of Alcoholic Beverage Control, to refrain from enforcing that portion of Business and

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[7] Cal. Stats. 1979, ch. 280, § 1, p. 958. Only the first sentence was amended. The second sentence remained unchanged.

[8] *Rice* v. *Alcoholic Beverages Appeals Board, supra,* 21 Cal.3d 431 (1978).

Professions Code section 23672 which provides:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent."

(*Norman Williams Company, et al.* v. *Rice,* 108 Cal.App.3d 348, 353 (1980); ptn. for hrg. den. by Cal. Sup. Ct.)

The Court of Appeal found:

> ". . . that the substantial federal policies of the Sherman Act are violated by the liquor designation statute and, in light of clear alternatives to that statute, the state interests sought to be achieved are not sufficient to outweigh those policies. We conclude that Business and Professions Code section 23672, as amended by Assembly Bill Number 499 (Stats. 1979, ch. 280, § 1) is invalid to the extent it authorizes private action in restraint of trade." (*Norman Williams Company, et al., supra,* at p. 362.) (Pet'n for Cert., p. 35.)

Consequently, section 23672 has never gone into effect.

At the same session at which it enacted section 23672, the California Legislature enacted Business and Professions Code section 23673, a liquor price affirmation statute, to insure that California distilled spirits wholesalers would be able to purchase distilled spirits from brand owners at the same price paid by wholesalers in Oklahoma, or any other state.

Section 23673 provides:

> "No brand owner of distilled spirits or his agent shall sell any brand of distilled spirits to a wholesaler

or rectifier in this state at a price higher than the lowest price at which such brand of distilled spirits is sold by such brand owner or his agent to any wholesaler or rectifier during any calendar month anywhere in any other state or in the District of Columbia or to any state or state agency which owns or operates retail distilled spirits stores.

"In determining the lowest price for which any brand of distilled spirits is sold in any other state or the District of Columbia or to any state or state agency which owns and operates retail distilled spirits stores, appropriate reduction shall be made to reflect all discounts, all rebates, allowances, and other inducements of any kind whatsoever offered or given to any such wholesaler or state, or state agency, as the case may be, purchasing such brand of distilled spirits in such other state or in the District of Columbia or to the state or state agency which owns or operates retail distilled spirits stores; provided that nothing in this section shall prevent differentials in price which make only due allowance for differences in state excise taxes and fees and the actual cost of delivery. As used in this section, the term 'excise taxes and license fees' shall mean the excise taxes imposed or the fees required by any state or the District of Columbia." [9]

This section became effective on January 1, 1980, and has been in operation since that date.

Although Business and Professions Code section 23673 was brought to the attention of the Court of Appeal, it failed to consider its effects with respect to the designa-

[9] Cal. Stats. 1979, ch. 407, § 1, p. 1499.

tion statute, section ~~26372~~ 23672. Had that Court done so, it could not have logically concluded that after the effective date of sections ~~26372~~ 23672 and ~~26373~~ 26373 there would be any material differential between the price paid to distillers by Oklahoma wholesalers or California wholesalers.

SUMMARY OF ARGUMENT

The initial approach to the validity of any state liquor statute concerning importation or distribution of liquor within a state should be through the Twenty-first Amendment. If the statute is clearly within the Amendment it should be free from the prohibitions of the Sherman Act. On the other hand, if it appears to be clearly within the Sherman Act, i.e., a delegated price-fixing statute, then it may be considered in the category of a per se violation of the Act. In those grey areas in between the two extremes, a court should look to see if the statute is possibly exempt from the Sherman Act, because of the Twenty-first Amendment grant of power to the states over the control of importation and structure of the liquor distribution system; within the state-action doctrine; or through application of a rule of reason test.

The instant California liquor importer designation statute is one directly within the express terms of the Twenty-first Amendment. It involves statutory restrictions on licensed liquor importer-wholesalers and prevents them from purchasing liquor for importation or distribution within the state unless they have been designated by the brand owner (distiller) to import

such brand. The statute directly concerns control over importation and structure of the California liquor distribution system. Its express purpose is to preserve the long established three-tiered structure of the California liquor distribution system by preventing the new fourth tier of operation created because of activities of undesignated importers. The Sherman Act is not applicable to the instant statute.

The Court of Appeal erroneously reached the conclusion that the Sherman Act rather than the Twenty-first Amendment was applicable because that court believed the statute required anti-competitive conduct by distillers which restricted importers and thereby affected the wholesale price of liquor.

The wholesale price of liquor is not a factor in this case. The Court of Appeal neglected to consider a newly enacted California price affirmation statute which went into effect on the same date the instant importer designation statute was to become operative. This new price affirmation statute was similar to that of Oklahoma, where distillers are required to sell to wholesalers (including respondent California licensed importer-wholesalers entitled to purchase in Oklahoma) at a price which is no higher than the lowest price offered to wholesalers anywhere in the United States. Since California now has a similar statute, the price distillers may charge to wholesalers in either state is necessarily the same.

In any event, the Court of Appeal should not have applied the Sherman Act without putting the California

liquor importer designation statute through a "rule of reason" analysis to test its conclusion. There admittedly is no per se violation of the Sherman Act in this case, yet the Court of Appeal took no evidence to aid it in reaching its conclusion.

ARGUMENT

I

THE TWENTY-FIRST AMENDMENT GRANTS TO THE STATES VIRTUALLY COMPLETE CONTROL OVER WHETHER TO PERMIT IMPORTATION AND HOW TO STRUCTURE THE LIQUOR DISTRIBUTION SYSTEM

The Twenty-first Amendment, section 2 provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the law thereof, is hereby prohibited."

This Court has recently iterated its long established position that the cited language gives an explicit grant of authority to the states with "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." (*California Retail Liquor Dealers Assn.* v. *Midcal Aluminum,* (*Midcal*) 445 U.S. 97, 107, 110 (1980).)

The section by its express language gives to the states practically plenary power to legislate concerning "transportation or importation" of liquor inside their borders. Such legislation may concern not only whether such transportation or importation should be absolutely pro-

hibited or permitted, but also whether it should be permitted only under specifically prescribed conditions. (*Ziffrin, Inc.* v. *Reeves,* (308 U.S. 132, 138–139 (1939); see also *State Board* v. *Young's Market Co.,* 299 U.S. 59 (1936); *Mahoney* v. *Joseph Triner Corp.,* 304 U.S. 401 (1938).)

II

THE CALIFORNIA LIQUOR IMPORTER DESIGNATION STATUTE IS WITHIN THE EXPRESS PURVIEW OF THE TWENTY-FIRST AMENDMENT

California Business and Professions Code section 23672 is totally within the express language of the Twenty-first Amendment. It specifically concerns importation, and is directly related to the structure of California's liquor distribution system.

It provides:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent."

A. The Express Language Of The Statute Relates To Importation Of Liquor Into A State

As an elementary proposition, it should be noted at the outset that the Twenty-first Amendment uses the word "importation;" the California statute uses the word "importer."

The statute is a pure expression of the regulatory powers over liquor importation given to the states. It goes directly to who may be an importer of liquor into California.

Under the statute, importation is permitted only when two factors coincide: (1) the existence of an importer already investigated, found qualified, and licensed by the state; (2) the designation of a particular importer chosen by a brand owner from the pool of those importers already investigated, found qualified, and licensed by the state. Only then may a licensed liquor importer purchase or accept delivery of any brand of liquor into California.

B. The Statute Is Directly Related To And Preserves California's Historic Three-Tiered Structure Of The Liquor Distribution System

Like many states, the California alcoholic beverage distribution system is based on a three-tiered structure: (1) distiller to (2) California importer-wholesaler to (3) California retailer. (*California Beer Wholesalers Assn., Inc.* v. *Alcoholic Bev. etc. Appeals Bd.,* 5 Cal.3d 402, 407–408 (1971); see also *Harris* v. *Alcoholic Bev. etc. Appeals Bd.,* 61 Cal.2d 305, 309 (1964).)

The importer designation statute is expressly designed to preserve the three-tiered structure of that system. It prohibits persons such as respondent importer-wholesalers from purchasing through a fourth tier, the Oklahoma wholesaler whose activity allows circumvention of the California three-tiered system. Absent the statute as is presently the case with nondesignated importers such as respondents, the liquor moves from (1) distiller through (2) Oklahoma wholesaler, to (3) California importer-wholesaler, to (4) California retailer.

C. The California Court Of Appeal Erroneously Concluded That The Importer Designation Statute Is Not Within The Purview Of The Twenty-First Amendment

With no analysis whatever, the Court of Appeal erroneously reached the conclusion that section 23672 was completely outside the scope of the Twenty-first Amendment. It merely concluded that:

> "California has determined to permit the importation of liquor into the state by private parties and has established a distribution system of which the petitioners are a licensed part. In division 9 of the Business and Professions Code the state has provided detailed requirements for those who desire to engage in the distribution of alcoholic beverages and the petitioners have complied with those requirements and obtained state approval to participate in the distribution of liquor. The designation statute does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution. The designation statute, like the price maintenance laws, is precisely the type of regulation which must be reconciled with the federal interests in interstate commerce."
>
> (*Norman Williams Co. et al.* v. *Rice, supra,* 108 Cal.App.3d at p. 359.)

The Court of Appeal was clearly in error. It would appear axiomatic that if the Constitution grants the states power to legislate with respect to "transportation or importation" of liquor, a statute such as section 23672, which expressly provides for purchase and delivery

restrictions on a state licensed liquor importer-wholesaler, is directly within the constitutional grant of the power. A similar conclusion should have been reached regarding the structure of the distribution system, especially in view of the Court of Appeal's intimate familiarity with this Court's interpretation of the Twenty-first Amendment in *Midcal.*

III

THE TWENTY-FIRST AMENDMENT RATHER THAN THE COMMERCE CLAUSE IS APPLICABLE TO ANALYSIS OF THE VALIDITY OF A STATE STATUTE DEALING EXCLUSIVELY WITH LIMITATIONS ON A STATE LICENSED LIQUOR IMPORTER-WHOLESALER'S AUTHORITY TO IMPORT LIQUOR INTO THE STATE

Rules of constitutional interpretation require that each part of the Constitution necessarily should be treated with the same dignity (*Richardson* v. *Ramirez,* 418 U.S. 24, 25 (1974)); that no constitutional guarantee should be given preference over another, resulting in subordination or deletion (*Ullman* v. *United States,* 350 U.S. 422, 428 (1956)); that where it is necessary to compare and weigh two different provisions it should be done without nullifying or substantially impairing one or the other.

These rules must be applied here in order to determine whether the Twenty-first Amendment grant of power to the states over liquor importation and distribution should be held paramount to the Commerce Clause under which the Sherman Act was enacted.

When, in the context of the instant case, the powers granted to the states under the Twenty-first Amendment are compared with those given to Congress under the Commerce Clause, it becomes evident that wherever possible the Twenty-first Amendment should be treated as a specific enactment and the Commerce Clause as a general enactment.

The Twenty-first Amendment language directly encompasses the language of the instant California importer designation statute.

The Twenty-first Amendment provides:

> "The transportation or importation into any State . . . ; for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is . . . prohibited."

The importer designation statute reads:

> "A licensed importer shall not purchase or accept delivery of . . . distilled spirits unless he is designated as an authorized importer . . . by the brand owner."

Under the express language of this statute, an undesignated licensed importer-wholesaler who attempted to import intoxicating liquor into California for delivery therein would be in violation of California law and would also be prohibited from doing so by the express language of the United States Constitution.

Thus, there is no conflict between the California liquor importer designation statute and the Twenty-first Amendment. Nor, on its face, is there any conflict between the statute and the Sherman Act. Accordingly, absent any such statutory facial conflict with the Sher-

man Act, the Twenty-first Amendment is applicable. If a per se violation of the Sherman Act were required by a state statute, the result might be otherwise. The *Midcal* liquor price setting delegation is an obvious example. But where there is no statutory facial conflict with the Sherman Act, a court should take great care before it declares such a statute invalid. Otherwise, it may unwarrantedly give preference to one part of the Constitution over another.

In the instant case, the lower court failed to engage in such discernment. It admittedly was presented with a statute which, in its words, was ". . . difficult to analyze . . . in terms of common violations of the Sherman Act because of the unique nature of the statute." (*Norman Williams Co. et al.* v. *Rice, supra,* 108 Cal.App.3d 348, 356.) Yet it inexorably and with little analysis reached the conclusion that the statute was invalid.

A court's analysis of a state liquor statute dealing with importation and distribution of liquor within the state should begin with the powers granted to the state under the Twenty-first Amendment. If the particular statute on its face appears to be within that Amendment, great care in analysis should be taken before the conclusion is reached that the Sherman Act in any particular instance is in derogation of those state powers. Every effort should be made to uphold the protective grant of power given to the states by the Twenty-first Amendment and only in extreme cases should the Sherman Act be applied.

On the other hand, if it cannot be readily determined

from reading the statute whether it is in direct conflict with the Sherman Act, the approach should be to see if the Twenty-first Amendment exempts the statute from the Sherman Act prohibitions. The statute should be tested to see if it is within the Twenty-first Amendment grant of power to the states over control of importation and structure of the liquor distribution system;[10] within the state action doctrine;[11] or through a rule of reason test.[12]

In this way, harmony between the two parts of the Constitution will be maintained; neither part will be subordinated or deleted, and neither part will be nullified or substantially impaired.

IV

CALIFORNIA HAS A VALID STATE INTEREST IN PRESERVING THE THREE-TIERED STRUCTURE OF ITS LIQUOR DISTRIBUTION SYSTEM THROUGH ENACTMENT OF THE LIQUOR IMPORTER DESIGNATION STATUTE

While there are many reasons which might be cited to show a valid state interest for enactment of the California liquor importer designation statute, the one which stands out most clearly is the preservation of the structure of the three-tiered system of distribution in the liquor industry. This is the one, above all others, which can be clearly pointed to for evidence of specific legislative intent.

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[10] *Midcal,* supra.
[11] Parker v. Brown, 317 U.S. 341 (1943).
[12] Continental T.V., Inc. v. GTE Sylvania, Inc. 433 U.S. 36 (1977).

The California three-tiered system, together with some of the reasons why it was believed to be desirable, was discussed by the California Supreme Court in *California Beer Wholesalers Assn., Inc.* v. *Alcoholic Bev. etc. Appeals Bd., supra,* 5 Cal.3d at pp. 407–408. Many of the reasons for enactment of the California importer designation statute which have been suggested by intervenors and certain amicus curiae can also be given as reasons for supporting the three-tiered system.

The instant importer designation statute was specifically enacted to shut off the fourth tier activity which had arisen during the hiatus while the former statute prohibiting such activity was not being enforced by the California Department of Alcoholic Beverage Control. Respondent importer-wholesalers operate outside the California three-tiered system. They place orders with an Oklahoma wholesaler who buys from the distiller and sells to the ordering importer-wholesaler. A fourth tier is thus now in existence outside the statutory scheme: (1) distiller to (2) Oklahoma wholesaler to (3) California importer-wholesaler to (4) retailer.

The Court of Appeal recognized this intrusion on the structure of the liquor distribution system and the existence of a fourth tier, but attempted to bypass the legislative function entirely, by strangely concluding that the policy behind the three-tiered structure would be strengthened if this new fourth tier which the Legislature specifically attempted to prevent were permitted to operate. In a footnote, that court said:

"[3] The designation statute is actually directly con-

trary to the public policy behind the three-tier distribution system. The three-tier system was established to maintain the independence of the various levels of the liquor industry and to prevent the integration of manufacturing, wholesale and retail functions. [Citing *Harris* v. *Alcoholic Bev. etc. Appeals Bd., supra.*] The designation statute reimposes the dependency of wholesalers upon brand owners which the three-tiered system was designated to prevent." (*Norman Williams Co. et al.* v. *Rice, supra,* 108 Cal.App.3d at p. 360.)

Assuming arguendo, that the statute might be somehow contrary to the policy behind the three-tiered structure issue, a conclusion to which we take strong exception, particularly since the Legislature enacted this new statute and must know its own policy, the question is not whether it might or might not affect the legislative policy, but rather does it require judicial alteration of the three-tiered system. The Legislature is the only proper group with the power to make that determination. If the legislative policy behind the three-tiered system seems to a court to be jeopardized, the Legislature would be the only body authorized to make the change to a four-tiered system, not the court.

Unquestionably here, there is a vital question as to whether a state Legislature has the constitutionally granted power under the Twenty-first Amendment to determine whether its liquor distribution system should be three-tiered or otherwise.

Permitting a local state court to substitute its judgment as to the details of the structure of the liquor distri-

bution system on the theory that it has such power through interpretation of the Sherman Act, solely a federal ground, is to deny the *Midcal* confirmation of constitutional grant to the state Legislature to formulate any liquor distribution system whatsoever. To hold otherwise would mean that if a local court found any possible restraint of trade resulting from any liquor statute, it could strike it down regardless of what legislative policy may have been present at its enactment. The enormity of the situation which would result is easily envisioned when it is realized that practically every liquor statute has some restraint of trade feature connected to it; i.e., prohibition of activities such as giving free goods, special rebates, free displays and inventory shelving.

V

THE CALIFORNIA LIQUOR IMPORTER DESIGNATION STATUTE DOES NOT REQUIRE A PER SE VIOLATION OF THE SHERMAN ACT

A. The California Liquor Importer Designation Statute Does Not Require Any Per Se Violation Of The Sherman Act.

The Court of Appeal erroneously held that the California liquor importer designation statute, on its face, required a per se violation of the Sherman Act because it enabled a brand owner (distiller), by refusing to name a licensed importer-wholesaler as his designee, to prevent the undesignated importer-wholesaler from purchasing liquor from an Oklahoma licensed wholesaler.

The theory of the Court of Appeal was that the importer designation statute was completely analogous to

the price fixing statute it had successfully struck down in *Midcal Aluminum, Inc.* v. *Rice, supra,* 90 Cal.App.3d 979, aff'd sub nom. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).)

B. The Court of Appeal Opinion Is Based On A Fallacious Conclusion That The Instant Case Should Be Treated As A Per Se Violation Of The Sherman Act Because It Is So Closely Analogous To The Designation Of Price Setting Required By The Statute In *Midcal* That It Must Be Treated Exactly *As If It Were A Price Case*

1. Price Has No Part In The Instant Case

The Court of Appeal in the instant case starts with the presumption that the California importer designation statute so directly affects price that it must be considered as if it were a price case. It said, in its opinion:

> ". . . After the price maintenance provisions of the Business and Professions Code were declared invalid the importer petitioners secured sources of supply of national brand distilled spirits in Oklahoma, referred to as the 'Oklahoma connection.' Under Oklahoma law a distiller who chooses to sell distilled spirits in Oklahoma must sell to all licensed Oklahoma wholesalers and may not discriminate either as to price or as to quantity. (12 O.S. 1961, tit. 37, §§ 501 et seq.) The distiller is required to sell distilled spirits at a rate which is no higher than the lowest rate at which the seller sells in any other state. (*Id.,* § 536.1, subd. (a).) The licensed wholesalers may sell to any licensed retailer or wholesaler within Oklahoma, and may sell distilled spirits out of Oklahoma to 'qualified persons.' (*Id.,* § 521, subd. (e).) The importer petitioners have been able to purchase na-

> tional brand distilled spirits in Oklahoma, import such distilled spirits to California, and sell these products to licensed retailers at prices below the suggested wholesale prices which the distillers provide to their designated wholesalers. . . . [The importer designation statute, Bus. & Prof. Code, § 23672] would effectively preclude the importer petitioners from competing for the wholesale market of certain national brands, because they have been denied designation as authorized importers by the brand owners. The petitioners thus will be unable to secure these brands from the distillers and are precluded from purchasing such brands from Oklahoma sellers." (*Norman Williams Co. et al.* v. *Rice, supra,* 108 Cal.App.3d 348.)

Without realizing the implication, the Court of Appeal reached its conclusion principally because of the fact that Oklahoma has a liquor price affirmation statute by which a distiller is required to sell distilled spirits at a rate which is no higher than the lowest rate at which the seller sells in any other state. However, the Court of Appeal neglected to consider that commencing January 1, 1980, California also would have a similar price affirmation statute, Business and Professions Code section 23673:

> "No brand owner of distilled spirits or his agent shall sell any brand of distilled spirits to a wholesaler or rectifier in this state at a price higher than the lowest price at which such brand of distilled spirits is sold by such brand owner or his agent to any wholesaler or rectifier during any calendar month anywhere in any other state . . . ." (Cal. Stats. 1979, ch. 407, § 1.)

With both states having price affirmation statutes after January 1, 1980, the price at which a brand owner could sell distilled spirits to a wholesaler in either Oklahoma or California would necessarily be the same. In her words, after the time the California importer designation statute, section ~~26372~~ 23402, was scheduled to go into effect, the prices wholesalers would have to pay brand owners in each state for similar merchandise would be the same.

This means that the Court of Appeal's treatment of the case as if it were a price case is totally without foundation. If wholesalers in California and wholesalers in Oklahoma would have to pay the brand owner the same price, the case becomes strictly one where the importer designation statute only relates directly to vertical restrictions in the distilled spirits industry.

2. Vertical Restrictions Are Not Per Se Illegal, And Those Cases Must Be Judged By Applicaton Of The Rule of Reason Instead Of The Doctrine Of Per Se Illegality

This Court has recently held, in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36 (1977), that vertical territorial restriction cases are to be decided by the rule of reason, not by the per se illegality rule, and price considerations are only one aspect of the analysis.

In the instant case the Court of Appeal, erroneously believing price was such an important factor, applied the per se doctrine and took no evidence as to whether the statute on its face interfered with competition. On that ground alone, the case should be reversed. Grounds for reversal become even stronger when, as indicated above, on the effective date of the statute in question,

California also had other legislation which went into effect that equated the California and Oklahoma wholesale distilled spirits prices. Thus, in the instant case, even if evidence were taken, the price to wholesalers necessarily would be the same (no higher than the lowest price at which the distiller sells in any other state), and the statute, on its face, would not affect price in any way.

C. The California Liquor Importer Designation Statute Does Not Require Any Conduct By Distillers Or Importers Which Violates The Sherman Act.

The California liquor importer designation statute does not require any distiller or importer-wholesaler to violate the Sherman Act. Such violation could occur, for example, if some conspiracy arose to freeze a particular importer-wholesaler out of a market. But should such conduct occur, the remedy would be by the affected damaged importer-wholesaler, civilly, or by the government, criminally, against the conspirators. Suit to stop enforcement of the designation statute itself because it might be abused by private parties is an improper method to correct the operation of a potential illegal activity.

CONCLUSION

The decision of the Court of Appeal is erroneous in that it gives greater status to the Commerce Clause (Sherman Act) than the Twenty-First Amendment in a situation directly involving state control over importation and structure of the liquor distribution system. The Twenty-first Amendment is applicable here because it is

a specific constitutional provision covering the very matter encompassed by the state statute: restrictions on importing liquor by state licensed liquor importer-wholesalers. The Sherman Act is not applicable here.

The Court of Appeal erroneously applied the Sherman Act instead of the Twenty-first Amendment because of its belief that the statute directly affected the price of liquor and thus the case should be treated as if it were a price fixing case. Actually, no price issue is involved because after the effective date in question, California also had another statute which prevented any distiller from selling to its wholesalers at any price higher than the lowest price charged wholesalers in any other state. Thus, because Oklahoma has a similar statute, the Oklahoma wholesale price, where the respondent California licensed importer-wholesalers are purchasing
liquor, is now necessarily the same as the California wholesale price.

In any event, whether price is peripherally involved, or not, the Court of Appeal erred when it failed to utilize the rule of reason analysis and took no evidence before it found the California importer designation statute invalid. This case is not a per se Sherman Act case and should not be treated as if it were.

The decision of the Court of Appeal should be reversed and its peremptory Writ of Mandate ordering petitioner Rice, Director of Department of Alcoholic Beverage Control of the State of California to desist from enforcing California Business and Professions Code section 23672 should be ordered withdrawn.

DATED: January 13, 1982.

Respectfully submitted,

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